Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-360

WILLIAM FRIEDLANDER - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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October Term, 1976

No. _____

WILLIAM FRIEDLANDER - - - - *Petitioner*

v.

KENTUCKY BAR ASSOCIATION - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioner, William Friedlander, respectfully prays that a writ of certiorari issue to review the judgment and opinion entered in the above entitled case on January 23, 1976, by the Supreme Court of Kentucky.[1]

OPINION BELOW

The opinion of the Supreme Court of Kentucky dated the 23rd day of January, 1976, is reported in 536 S. W. 2d 454 (Ky. 1976). It is reprinted in the Appendix hereto, p. 1a, *infra*. The findings and recommendations of the Board of Governors dated July 19,

[1]While this case was in process, Kentucky's new Judicial Amendment became effective on January 1, 1976, thereby changing the highest Court in the State of Kentucky from the Court of Appeals to the Supreme Court of Kentucky.

1975, are not reported, and appears in the Appendix herein, pp. 13a-14a, *infra*.

The opinion, findings of fact, conclusions of law, and recommendations of the trial committee, filed on April 18, 1975, are not reported; they are reprinted in the Appendix herein, pp. 8a-12a, *infra*.

JURISDICTION

The petitioner, a licensed practicing attorney in Kentucky, was charged by the Kentucky Bar Association with one count of unprofessional conduct. See Appendix herein, pp. 15a-15b, infra. Following an Evidentiary Hearing before a trial committee and an *in camera* proceeding by the Board of Governors, the Supreme Court of Kentucky made its own fact-finding and conclusions and ordered that the petitioner be "permanently disbarred from the practice of law" in Kentucky. Federal constitutional challenges to the procedure leading to such order were raised before the Supreme Court of Kentucky and therefore rejected by it, though its opinion does not expressly reject all such claims. *New York, ex rel., Bryant* v. *Zimmerman,* 278 U. S. 63, 67 (1928). See pp. 4a-5a, *infra*.

A timely petition for rehearing was denied by the Supreme Court of Kentucky without opinion on June 11, 1976. See p. 6a, infra.

This petition for writ of certiorari has been filed within 90 days after the order denying rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Since the Board of Governors' decision can be final, should it not provide a due process hearing and allow for oral argument before it to urge a result of not guilty or for a private reprimand if found guilty?
2. If the Supreme Court of Kentucky decision is done on the basis of a *de novo* consideration of the pleadings and trial record, must it provide a due process evidentiary hearing and oral argument?
3. Has the Bar Association met the burden of proof and should the standard of proof be "beyond a reasonable doubt" rather than "a preponderance of evidence" under RAP 3.330?
4. Where the Supreme Court of Kentucky is the court of original jurisdiction, is it a denial of equal protection and due process to deny the right of appeal to attorneys although every other litigant in Kentucky is permitted an appeal as of right?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Sec. 1:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rules of Appellate Procedure of the Supreme Court of Kentucky (RAP), 7 Baldwin's Kentucky Revised Statutes (1969):

RAP 1.280. When granted.—Oral arguments will be heard on motion of either party or on the court's own motion in such cases as the court may believe an oral argument will materially contribute to a proper decision.

RAP 3.170. Processing disciplinary cases.—Upon the expiration of fifteen days, or receipt of response, the director shall refer the matter together with such investigative evidence as may have been obtained, to the tribunal to determine whether the complaint should be dismissed or file a charge.

RAP 3.330. Order of proceedings and burden of proof.—The trial committee shall determine and regulate the order of proceedings at the hearing. Upon the application of a party or upon direction of the trial committee the director shall issue subpoenas for the attendance of witnesses or the production of evidence. The burden of proof shall rest upon the association in a disciplinary proceeding and the facts must be proven by a preponderance of the evidence. In reinstatement hearings the burden shall rest upon the applicant. Before submission the trial committee may direct such oral argument as it deems appropriate and receive briefs from all parties on such terms as it may impose. After submission of the case to the trial committee there shall be no further oral argument or briefing either before the trial committee or before the board.

RAP 3.360. Trial committee to file report with board.—When a disciplinary proceeding has been finally submitted, the trial committee shall promptly file with the board the entire transcript of the proceeding, the transcript of testimony together with such briefs as may have been filed and a written report in the nature of findings of fact and conclusions of law, which shall contain a concise statement of:

(a) the charges made against and the defense offered by the respondent;

(b) the proceedings had;

(c) the facts which the committee deems proven by a preponderance of the evidence, the committee's conclusions; and

(d) its recommendations as to the disposition of the case.

The trial committee's report shall constitute a part of the record in the case. The report shall be advisory.

RAP 3.370. Board's action on trial committee's report.—Upon receipt of the report of the trial committee the board shall promptly consider and act upon the entire record. Only the president, the president-elect, the vice-president and the four-

teen duly elected members of the board from their respective appellate districts shall be eligible to be present, participate in, and vote on any disciplinary case. Any member who has participated in any phase of a disciplinary case submitted to the board under this rule, or has been challenged on grounds sufficient to disqualify a circuit judge, shall be disqualified and the chief justice shall appoint a member to consider and act on the case.

The board shall decide, by a roll-call vote, whether the respondent is guilty or not guilty. If the respondent be found not guilty, the board's action is final. If the respondent be found guilty, the board shall then decide by a second roll-call vote, the disciplinary action to be recommended. Both the finding of guilty and the disciplinary action to be recommended must be agreed upon by a majority of the members of the board entitled to vote in the proceedings. The result of each of the two votes shall be recorded in the board's minutes. The president shall sign and file with the director an order setting forth the board's action, and the director shall mail copies of such order together with a copy of the trial committee's report to the parties or their counsel and to each member of the tribunal. If discipline is recommended the entire record, together with a certified bill for costs and expense incurred in the investigation preliminary to, and in the conduct of, the proceedings shall be filed with the clerk. Any recommendation to the court that disciplinary action be taken shall be advisory.

RAP 3.410. Procedure in the court.—Promptly upon the filing of the order as provided in RAP 3.370, the clerk shall advance the case on the docket

and shall forthwith issue a rule against the respondent returnable within twenty days after service of the rule, requiring the respondent to show cause why he should not be adjudged guilty of unprofessional conduct and disciplined therefor. When the respondent is proceeded against by warning order, the rule shall be deemed to have been served thirty days after the date of the making of the warning order. If response is not filed when due the court shall enter judgment against the respondent, adjudging him guilty of unprofessional conduct and disciplining him. When a response is filed, the respondent shall furnish a bond with surety acceptable to the clerk, conditioned that if the principal in the bond be disciplined by the court, he will promptly pay all costs incurred in the proceeding, including those certified under RAP 3.370. If he files his response in forma pauperis no bond shall be required.

STATEMENT OF THE CASE

This case concerns the disbarment from the practice of law of the petitioner, Mr. William Friedlander. Mr. Friedlander is a 51 year old attorney, who has a working wife and a daughter in college, attended Berea College, served in the United States Navy, was graduated from the University of Louisville Law School and has been engaged in the practice of law since 1950. His only present source of income is the practice of law. He is a member of the Louisville Bar Association, the Kentucky Bar Association, the American Judicature Society, Christ Church Cathedral, an Episcopalian church, and at the time of the trial, was

finance chairman for the Louisville Inter-Religious Organization's tornado relief efforts.

He and his law partners organized Kentucky Insured Title Company in about 1967. This corporation was engaged in the insuring of title and real estate closings as an agent for Pioneer National Title Insurance Company. For the purpose of disbursements, an "escrow account" was kept by the company for the disbursal of mortgage monies. The money flow in said account for the year of 1973 was $22,368,000.00. The account was set up whereby any one of five partners of the petitioner and any one of four employees could sign checks on this account. On July 26, two checks on said account, one in the amount of $8,757.70 signed by someone other than the petitioner, and another in the amount of $109,851.69 signed by the petitioner were issued. These checks were partial disbursements of a progress payment of $135,076.49 on a construction project. Said amount was deposited to the corporation escrow account before the delivery of said checks. The checks bounced, evidentally due to other checks issued by other officers of the corporation clearing the bank first. The obligations represented by these checks were paid in full before any complaint was made to the Bar. Subsequently, a one count charge was filed against the petitioner by the Kentucky Bar Association. It is reprinted in the Appendix hereto, pp. 15a-15b, *infra*. None of the other members of the firm, co-owners of the title corporation, were charged nor was there any charge that the petitioner in any way profited from this transaction or that any of his clients suffered any pecuniary loss.

A. The Trial Committee Hearing

A duly constituted trial committee, consisting of three lawyers, conducted an Evidentiary Hearing on June 18, 1974, and June 27, 1974. The Bar Association and the petitioner produced and examined witnesses and submitted documentary evidence at the hearing. At this hearing, all due process requirements were satisfied with the exception of:

> (1) the trial committee allowing testimony of a Mr. Harvey, Attorney for Southern Title Insurance Company, to be placed in evidence, partially by avowal; and
>
> (2) long after all testimony had been taken and the trial was closed, the Bar Association attempted to introduce a copy of a complaint filed in Federal Court styled Pioneer National Title Insurance Company v. Jonathan T. Belknap, et al., and a newspaper article published by the Louisville Courier-Journal.

The petitioner promptly filed an objection to the introduction of the exhibits as the "rankest" kind of hearsay. This motion has never been ruled on by the committee or any of the subsequent legal bodies involved in this process. The trial committee then made their recommendations on April 16, 1975 (see p. 12a, *infra*), in which two members of the committee found the petitioner guilty of unethical conduct and recommended one year's suspension. The other member recommended a reprimand only for said conduct. The

trial committee made no finding that the petitioner, in any of these transactions, acted fraudulently or with wrongful intent.

B. The Board of Governor's *In Camera* Proceedings

The trial committee report and the entire record (including the avowal, newspaper clipping and the Federal Court complaint)[2] was promptly filed with the Board of Governors in accordance with RAP 3.360. The petitioner was not aware that the trial committee had made their Findings of Facts, Conclusions and Recommendations. This report is "advisory" only under RAP 3.360.

The proceedings before the Board are held in secret. The petitioner was not entitled to appear under RAP 3.370, nor was he entitled to make an oral argument or submit a written brief under RAP 3.330. In fact, he had no knowledge that his case was under consideration at this meeting.

If the Board of Governors finds an attorney not guilty of the charges or if they find him guilty but the sanction is a private reprimand under RAP 3.370, "the Board's action is final".

The Board met at Barren River State Park, Glasgow, Kentucky, on July 19, 1975, *in camera*. Under RAP 3.370, the petitioner was adjudged guilty by a roll call vote of 12-2. The second roll call result of 11-3

[2]The court's decision states they "are disregarding the testimony objected to by the respondent . . ." Therefore, it is evident it was contained in the record forwarded from the Board. There is no such assurance that the Board members did not consider this incompetent evidence.

recommended that the petitioner be permanently disbarred from the practice of law in Kentucky.[3] See pp. 13a-14a, *infra*. RAP 3.370 further states that this "recommendation to the Court that disciplinary action be taken shall be advisory".

C. The Supreme Court Proceedings

On July 31, 1975, a show cause rule was issued by the Clerk of the Supreme Court of Kentucky. See p. 7a, *infra*. With this rule, the petitioner received the minutes of the Board of Governors meeting and the trial committee recommendations.

Timely briefs, based on the record, were filed by the petitioner and the Kentucky Bar Association with the Supreme Court of Kentucky. On January 23, 1976, the Court issued another per curiam opinion. This opinion mentions several of the Federal constitutional arguments presented and rejected by them by saying "Nor do we believe that due process or equal protection of the law is involved at all in this respect". See p. 5a, *infra*. In addition, constitutional arguments were presented in the petitioner's brief (pp. 38-43). These constitutional arguments were not specifically ruled upon by the Supreme Court of Kentucky; therefore, it must be considered as having been rejected. *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67 (1928).

[3]After the Board of Governors' decision, the petitioner attempted, by interrogatories, to determine what made up the "entire record" under RAP 3.370 and what actual consideration was given to this record by the Board. The Supreme Court of Kentucky rejected the request. See p. 5a, *infra*.

REASONS FOR GRANTING WRIT

In Re Ruffalo, 390 U. S. 544, pages 550, 551 (1968), establishes that disciplinary proceedings of an attorney are "adversary proceedings of a quasi-criminal nature". Long ago this Court recognized the Fourteenth Amendment principles that a disbarment order arising from such a quasi-criminal proceeding cannot stand if "the State procedure, from want of notice or opportunity to be heard was wanting in due process". *Sellings* v. *Radford,* 243 U. S. 46, 51 (1917). The petitioner is thus justified invoking the certiorari powers of this Court to reject a state disbarment order which presents important procedure principles under the Fourteenth Amendment. No prior decision has focused on these two process questions created by the procedures employed in Kentucky. These procedures are similar in nature to many states other than Kentucky making any forthcoming decision of nationwide importance.[4]

This is even more important in Kentucky. Court decisions are not indicative of the total volume of disciplinary proceedings. Many do not go into formal proceedings under RAP 3.170 and others go through the formal hearing process but are terminated at the Board of Governors under RAP 3.370. In the last

[4]Among states that employ procedures substantially similar are New Jersey (Sup. Ct. Rule 1:20); Maryland (Ann. Code, Art. 10, §§ 11-23); Illinois (Rev. Stat. § 110A); Oregon (Rev. Stat. § 9.540); North Carolina (Gen. Stat. § 84-15 et seq.); New York (J. L. § 90[2]); Iowa (Sup. Ct. Rule 118).

seven volumes of reported decisions, the Court decided 95 cases. Of these, ten (or more than one in ten) involved disciplinary proceedings.[5]

1. Since the Board of Governors' Decision Can Be Final, Should It Not Provide a Due Process Hearing and Allow For Oral Argument Before It To Urge a Result of Not Guilty or for a Private Reprimand If Found Guilty?

The trial committee recommended that the petitioner be suspended for one year (see p. 12a, *infra*), with one member voting for a private or public reprimand (see p. 12a, *infra*).[6] Had the Board of Governors

[5]*Lester* v. *Kentucky Bar Association,* 532 S. W. 2d 435 (denied reinstatement); *Kentucky Bar Association* v. *Signer,* 533 S. W. 2d 534 (remanded for further consideration); *Kentucky Bar Association* v. *Collis,* 535 S. W. 2d 95 (disbarred, *Cert. denied* 46 L. Ed. 637); *Kentucky Bar Association* v. *Getty,* 535 S. W. 2d 91 (6 mos. suspension); *Kentucky Bar Association* v. *Franklin,* 534 S. W. 2d 459 (6 mos. suspension); *Kentucky Bar Association* v. *King,* 535 S. W. 2d 83 (disbarred); *Kentucky Bar Association* v. *Tucker,* 535 S. W. 2d 97 (disbarred, *Cert. denied,* 46 L. Ed. 644); *Kentucky Bar Association* v *Friedlander,* 536 S. W. 2d 469 (disbarred); *Kentucky Bar Association* v. *Vincent,* 537 S. W. 2d 171 (6 mos. suspension); and, *Kentucky Bar Association* v. *Vincent,* 538 S. W. 2d 39 (1 yr. suspension), all per curiam decisions without dissent. In *Kentucky Bar Association* v. *Tucker,* some of the issues presented therein were before this Court; however, in Case No. C76-0023-L(B), Tucker v. Clayton, et al., United States District Court, Western District Court of Kentucky, a three-judge Court was convened to determine the constitutionality of various rules of the Supreme Court of Kentucky.

[6]This member dissented stating: " . . . Cases of this nature should more appropriately be handled by private or public reprimand. Suspension or disbarment should be imposed only where recourse to less stringent measures would not fully and adequately protect the public. In any profession suffering the restraints of self-imposed regulation, there exists, always, the hazard of losing sight of the real and genuine purpose of such regulations. Often the decision turns upon punishing the respondent as a criminal wrongdoer rather than taking such remedial steps as may be necessary to maintain the legal profession in high esteem."

determined that the petitioner was not guilty of the charges or felt he was guilty and that the dissenter was correct in his recommendation for a private reprimand, then its determination would have been final as provided by RAP 3.370.

Under these circumstances, he would have been denied all due process protection before the Board that could make a final determination. There is no opportunity to submit a written brief or make an oral argument. The fact that the Board of Governors' determination was such that their actions were not final in this particular case does not change the fact that an attorney is entitled to due process. He is entitled to be advised of the trial committee's actions and the right to be heard before the Board. See *Southern Railway Co.* v. *Virginia,* 290 U. S. 190 (1933).

At this stage of the proceeding, due process protection must be provided in the Kentucky procedure. As early as 1908, this Court, in *Londoner* v. *Denver,* 210 U. S. 373, 386, states:

> "But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal."

It is the obligation of the Board of Governors, if they retain the authority to finalize, to consider the evidence or argument for "the one who decides must hear". *Morgan* v. *United States,* 298 U. S. 468, 481 (1936). At the very least, procedural due process re-

quires an oral argument. In *F.C.C.* v. *WJR,* 337 U. S. 265, 276 (1949), this Court stated "the right of oral argument as a matter of procedural due process varies case to case in accordance with differing circumstances". Disciplinary proceedings are "quasi-criminal". *In Re Ruffalo, supra.*

The petitioner submits that disbarment is so severe a penalty when pertaining to a lawyer's career that due process requires the right to be heard orally before any body with the power to make a final disposition. *Herring* v. *New York,* 422 U. S. 853 (1975), reaffirms "the adversary system's commitment to argument" in a criminal case and should be applicable to a "quasi-criminal" disbarment action.

2. If the Supreme Court Decision Is Done on the Basis Of a *De Novo* Consideration of the Pleadings and Trial Record, Must It Provide a Due Process Evidentiary Hearing and Oral Argument?

The Supreme Court of Kentucky in *Kentucky Bar Association* v. *Stivers,* Ky., 475 S. W. 2d 900, 903-904 (1971),[7] stated:

> "In any event, the report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. (RAP 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual as well as the legal issues and of the final action to be taken. The role of fact-finder is neither welcome nor comfortable to an appellate

[7]Certiorari denied 406 U. S. 968 (1972) but constitutional issues present not raised.

court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding."

* * *

"In a matter as serious as this the advisory weight of the Board's action can be little more than hortatory, which means in simple English that the members of this court are going to exercise their own judgment anyway."

and reinforced in *Kentucky Bar Association* v. *Collis,* Ky., 535 S. W. 2d 95 (1975), *Cert. denied,* 46 L. Ed. 637.

Thus, the Court is acting as a *de novo* fact-finder. If the Court is going to take on "the role of fact-finder" and relegate the fact-finding function of the trial committee and the recommendations of the Board of Governors to "hortatory", then due process protections as discussed relating to the Board of Governors applies to the court.

It should be noted that under RAP 1.280, there is a provision for oral argument at the Supreme Court of Kentucky but that it is discretionary. There was no oral argument in any cases cited under Footnote No. 5.

This Court's decision in *Willner* v. *Committee on Character,* 373 U. S. 96 (1963), on admission to the bar action, the New York Supreme Court relied on a report of a committee which failed to hold a hearing with due process protections as a basis for rejecting the application.

3. Has the Bar Association Met the Burden of Proof and Should the Standard of Proof be "Beyond a Reasonable Doubt" Rather Than "A Preponderance of Evidence" Under RAP 3.330?

RAP 3.330 states that "the burden of proof shall rest on the Association in disciplinary proceedings and the facts must be proven by a preponderance of evidence". Yet, disciplinary proceedings are "quasi-criminal". *In Re Ruffalo, supra.*

The test in criminal matters is "beyond a reasonable doubt". In a juvenile delinquency proceeding, *In Re Winship,* 397 U. S. 358, 359 n. 1 (1970), this Court struck down a standard of preponderance of evidence and required the standard of reasonable doubt.

In a deportation proceeding, although non-criminal, this Court required that the proof be "unequivocal and convincing evidence" where the proceedings have a grave impact upon the lives of human beings. *Woody* v. *Immigration and Naturalization Service,* 385 U. S. 276, 285 (1966).

It is not enough to say, "Nor is it necessary that the charge be proved beyond a reasonable doubt, though it is probable that each judge of this Court, in deciding so serious a matter, actually applies that criteria anyway". *Kentucky Bar Association* v. *Franklin, supra,* at page 463.

The facts in this case demonstrate how the standard of proof was critical at each stage of the proceedings. The trial committee voted two to one with the dissent opting for a private or public reprimand. If the standard had been "beyond a reasonable doubt" or

"unequivocal and convincing", the result could have been different. Before the fourteen-man Board of Governors, who is to say that the votes of 12-2 for guilty and 11-3 on the sanction would not have changed with a different standard of proof?

4. Where the Supreme Court of Kentucky is the Court of Original Jurisdiction, Is It a Denial of Equal Protection and Due Process to Deny the Right of Appeal to Attorneys Although Every Other Litigant in Kentucky is Permitted an Appeal as of Right?

In Kentucky, the State Legislature has provided that all litigants—criminal and civil—*other* than attorneys charged in disciplinary proceedings, have at least one appeal as right from the decision of the trier of fact. There is no dispute that the Supreme Court of Kentucky is the trier of fact. In *Kentucky Bar Association* v. *Stivers, supra,* at page 904, the Court stated:

> "In a matter as serious as this the advisory weight of the Board's action can be little more than hortatory which means in simple English that the members of this Court are going to exercise their own judgment anyway."

This view was reaffirmed by *Kentucky Bar Association* v. *Franklin, supra,* at page 463, where the Court said:

> "A final decision of guilt can be made only by this Court and it is done on the basis of a *de novo* consideration of the pleadings and the trial record."

The Supreme Court of Kentucky does not sit or review the report and recommendations of the Board of Governors as an appellate tribunal. After the Board has made its determination, the entire record, including the recommendations, is filed with the Supreme Court of Kentucky, RAP 3.370, and a rule is issued for the attorney "to show cause why he should not be adjudged guilty of unprofessional conduct and disciplined therefor". RAP 3.410.

This Court has held that once a State Legislature provides for an appellate process, it may not deny an appeal to a selected class of litigants on an arbitrary or capricious basis.

> "When an appeal is afforded . . . it cannot be granted to some litigants and carpriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey* v. *Normet,* 405 U. S. 56, 77 (1972).

The denial of appeal in disciplinary proceedings are not in the same class as ordinary civil or criminal litigants. Even if that were true, equal protection would still be denied, for the state gives to all Kentucky professionals, *except attorneys,* the right of at least one judicial review of disciplinary determination against them; and, the scope of the review embraces all questions of law and fact, including the substantiality of the evidence.

CONCLUSION

Thus it is clear that at both the administrative and judicial level, due process was lacking and that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF KENTUCKY

RENDERED: JANUARY 23, 1976

KENTUCKY BAR ASSOCIATION - - *Complainant*

v.

WILLIAM FRIEDLANDER - - - - - *Respondent*

PER CURIAM

This is a disciplinary proceeding in which the board of governors of the Kentucky Bar Association found respondent guilty of unprofessional conduct and recommended that he be permanently disbarred from the practice of law.

The charge filed against respondent by the Kentucky Bar Association stated that respondent issued two checks in the total amount of $135,076.49 which were returned by the bank to the payee because of insufficient funds.

A trial committee appointed in accordance with RCA 3.230 heard the testimony of witnesses. After finding respondent guilty of the charge, the committee recommended that he be suspended from the practice of law for a period of one year. The board of governors at a subsequent meeting considered the record pursuant to RCA 3.370, found the respondent guilty of the charge and recommended that he be permanently disbarred from the practice of law. RCA 3.380.

Respondent and his law partners organized Kentucky Insured Title Corporation in 1967. About two years after the organization of the company, respondent's law firm became the sole owners of the corporation, and the members of the firm became officers of the title company. The law firm practice was limited exclusively to real estate

closings for the title company. The only meetings of the officers of the title company were the regular weekly partnership meetings of the law firm.

In July 1973, a check to the title company in the sum of $135,076.49 was received by respondent from Kentucky Mortgage Company. This check was placed in the Kentucky Insured Title Corporation's escrow account. These funds were received by respondent as attorney for Kentucky Insured Title Corporation during the course of his representation of the sponsor of an apartment structure in Paducah, Kentucky. Two checks were drawn on the title company's escrow account: one in the sum of $109,851.69, payable jointly to the contractor of the apartment structure in Paducah and the surety guaranteeing performance of the contract; the other in the sum of $8,757.70, payable to Kentucky Mortgage Company Mortgage Investors, in payment of interest due on a mortgage on the apartment structure.

Respondent travelled to Paducah, made an examination of the title for liens and delivered the check signed by him to the contractor. He then called and directed his office to issue the other check, which was signed by one of his partners. Respondent then notified Kentucky Mortgage Company that he had disbursed the funds. Both checks were returned because of "insufficient funds." Respondent directed that the checks be redeposited. He failed in an attempt to secure a bank loan to cover the checks, and the checks were again returned for "insufficient funds."

Respondent asserts that he had every reason to believe the checks would be honored by the bank and that he would not have authorized issuance of the checks had he thought otherwise. Respondent's testimony with regard to the events leading up to the situation resulting in this disciplinary action does not bear out his assertion. We are disregarding the testimony objected to by respondent as being outside the matter contained in the charge by the Ken-

tucky Bar Association and are considering only respondent's testimony.

After the date of organization, the business of Kentucky Insured Title Corporation increased rapidly. Large sums of money required for the many real estate closings were flowing through the company's escrow account. In 1972, the title for a project in Lexington, Kentucky, was certified by respondent's law firm; and it was later determined that there was an outstanding mortgage on the property that had been overlooked in the title search. Respondent negotiated a settlement with the mortgage holder for the sum of $42,000. According to respondent, the firm did not make a claim on their errors and omissions policy for fear that the insurance carried would cancel the policy. Instead, the $42,000 was taken from the escrow account of Kentucky Insured Title Corporation and paid over to the mortgage holder. After that, in January 1973, there occurred a freeze in further construction funds by HUD, the federal agency which supplied or guaranteed funds for a major portion of the business of Kentucky Insured Title Corporation and respondent's law firm. After this, in order to bolster the declining volume of business, respondent's law firm acquired by purchase the National Mortgage Company, which specialized in loans for single-family dwellings. This venture was not successful and entailed a further expenditure of $40,000, which was taken out of the escrow account of Kentucky Insured Title Corporation. At the time respondent issued the two checks, subject of the charge, he states that he knew the escrow account was in the "red." He states that the accounting procedures were so confused that none of the partners in the firm knew the bank balance at any given time. He states that he and other members of his law firm wrote checks on the escrow account in anticipation of deposits to be made. This practice is referred to in the evidence as "playing the float."

Respondent testified that a "float" was involved, and "I feel that it got away from me, and that it probably got away from everybody else in the firm." On July 31st, the bank balance of Kentucky Insured Title Corporation was minus $48,000, and the company was out of business.

We are presented here with a factual situation analogous to that presented in *Kentucky Bar Association* v. *Tucker,* Ky., 535 S. W. 2d 97 (rendered May 9, 1975), and *Kentucky Bar Association* v. *Collis,* Ky., 535 S. W. 2d 95 (rendered May 9, 1975), which is misappropriation of trust monies by a member of the bar. No inference is necessary here. Respondent admits that he participated in the use of trust funds from the escrow account of Kentucky Insured Title Corporation for the benefit of his law firm.

We are of the opinion that such conduct is so dishonest and reprehensible as to make him unfit to remain a member of the bar. For the reasons set out in *Collis* and *Tucker,* we hold that respondent should be permanently disbarred from the practice of law.

Respondent argues that the disciplinary rules of this court deny due process of law and equal protection of the law. We have difficulty in following respondent's argument in this respect.

First, respondent argues that RCA 3.370 provides that any member of the board of governors who "has been challenged on grounds sufficient to disqualify a circuit judge, shall be disqualified . . ."; but there is no way to challenge a member of the board of governors for the reason that respondent does not know when his case is to be considered by the board of governors and does not know which members of the board might participate. The simple answer to respondent's argument is contained in RCA 3.360, which provides that the trial committee shall file its finding and recommendations with the board and that the report shall be advisory. Obviously the proceedings are never concluded with the trial committee, so the respondent can use his own judgment in selecting a time prior to the end of the

proceedings before the trial committee to make such challenges as he may desire to any members of the board. The membership of the Board is known to respondent; and, further, it is not suggested that respondent desired to make a challenge in any event.

Next respondent argues that because of the extreme difference between the recommendation of the trial committee and the recommendation of the trial committee and the recommendation of the board he was entitled to answers to interrogatories addressed to the board of governors: "Did all the members of the Board receive a copy of the recommendations of the Trial Committee? Did all the members of the Board receive copies of the briefs filed in this case and have time to read them? RCA 3.370 provides that 'the Board shall promptly consider and act upon the entire record.' Did the members of the Board have time to read the entire record so that they could properly act upon it?"

The thrust of the interrogatories according to respondent was to ascertain whether any real study was given to the facts involved in this case by the board of governors.

That a reviewing body should be subjected to such a procedure is a novel concept of due process, and the logical extension of respondent's argument is such that we conclude it is not proper to propound such interrogatories. Nor do we believe that due process or equal protection of the law is involved at all in this respect.

Suffice to say, it is obvious to us that the board did understand the record. We have read it, and our understanding and the interpretation we place on the facts lead to our conclusion that respondent should be permanently disbarred from the practice of law.

Accordingly it is ordered that the respondent be and he is hereby permanently disbarred from the practice of law in this Commonwealth, and he is required to pay the cost of this proceeding.

COMMONWEALTH OF KENTUCKY

OPINION RENDERED: JANUARY 23, 1976

(Seal)

Supreme Court of Kentucky

KENTUCKY BAR ASSOCIATION

v.

WILLIAM FRIEDLANDER

Appeal From: In Supreme Court

MANDATE

It is therefore ordered that the respondent William Friedlander, is hereby permanently disbarred from the practice of law in the Commonwealth of Kentucky, that he fully comply with the provisions of RAP 3.390 and that the respondent is ordered to pay the costs of this action including the cost certified by the Kentucky Bar Association.

RESPONDENT'S PETITION FOR REHEARING DENIED—6/11/76

A Copy—Attest:
Issued June 11, 1976

(s) Martha Layne Collins
Clerk

RULE ON FINDING AND RECOMMENDATION OF THE BOARD OF GOVERNORS OF THE KENTUCKY BAR ASSOCIATION

THE COMMONWEALTH OF KENTUCKY,

To the Sheriff of Jefferson County, GREETINGS:

The President of the Kentucky Bar Association having filed an order pursuant to RCA 3.370 recommending disciplinary action in the matter of

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

WILLIAM FRIEDLANDER - - - - - *Respondent*

you are hereby commanded to summons Respondent to appear before the Court of Appeals, Frankfort, Kentucky, or file due response within 20 days after the service of this summons, and show cause, if any he has or can, why he should not be adjudged guilty of unprofessional conduct and disciplined therefore, and warn him that upon his failure to answer, the Rule herein shall be made absolute and you will make due return of this summons immediately upon the execution thereof.

Issued at Frankfort, Kentucky, this the
31 day of July, 1975.

(s) Frances Jones Mills
Clerk, Court of Appeals

COURT OF APPEALS OF KENTUCKY

KENTUCKY STATE BAR ASSOCIATION - - *Complainant*

v.

WILLIAM FRIEDLANDER - - - - - *Respondent*

REPORT OF TRIAL COMMITTEE—Received April 18, 1975.

STATEMENT OF CHARGES

1. Respondent was president of Kentucky Title Insurance Corporation (hereinafter referred to as KTIC), which was agent for a title insurance company. He disbursed funds in the amount of $109,851.09 from the corporation escrow account on July 27, 1973, to the general contractor on a project in Paducah which was being handled by KTIC. The check issued was returned twice because of insufficient funds in the account.

2. In connection with the same project, Respondent disbursed funds from the corporation escrow account on July 27, 1973, to KMC Mortgage Investors, in the amount of $8,757.70 for interests; the check issued was also returned twice because of insufficient funds in the account.

3. That the above facts and actions constitute unethical and unprofessional conduct on the part of Respondent and that same are calculated to bring the bench and bar of Kentucky into disrepute.

STATEMENT OF DEFENSES

1. That the checks mentioned in the charge were not issued by Respondent, individually, but as an officer of KTIC.

2. That at the time the subject checks were issued, Respondent believed that there were sufficient funds to cover them; that the error was due to the confused state of the records of KTIC and the matter was further confused and complicated by the fact that one of the members of Respondent law firm who handled the books for KTIC had died shortly before the transaction involving the checks.

3. That the obligations represented by the checks have been paid in full.

4. That various due process issues were reserved as defenses but not argued.

STATEMENT OF PROCEEDINGS

The trial committee comprised of Hon. John D. Miller, Hon. Lawrence I. Messmer and Hon. Gardner L. Turner, the latter acting as chairman, were appointed to hear the charges after proper notification to Respondent; and hearings were held on June 18, 1974 and June 27, 1974, in the officers of Yoder & Commons, 231 S. Fifth Street, Louisville, Kentucky, after an initial continuance from May 14th requested by Respondent. The Respondent was present at the hearing and represented by Hon. Stuart Lampe of Louisville; the Complainant was represented by Hon. John Famularo and Hon. Leslie G. Whitmer. The trial committee had jurisdiction to hear the matter and proceeded to do so. After hearing the testimony of all the witnesses, including that of the Respondent, and examining the various exhibits, and reviewing the briefs and supplemental briefs of the parties, the committee reports as follows:

FINDINGS OF FACT

1. That Respondent was a member of the three-partner law firm of Friedlander, Webb and Belknap of Louisville which owned KTIC, the firm members all being active in KTIC.

2. That Respondent was the president of KTIC which acted as agent for various title insurance companies.

3. That in July, 1973, in connection with the financing of the construction of a certain housing project in Paducah, KTIC received as agent from Kentucky Mortgage Company the sum of $135,076.49, which sum was deposited in KTIC's escrow account for eventual transfer to the contractor on the job and also to pay a certain interest payment.

4. That two checks dated July 26, 1973, were issued by Respondent, as president of KTIC, on the aforesaid escrow account to:

(a) Seth E. Giem and General Insurance Company of America (the contractor and bonding company), in the amount of $109,851.69; and

(b) KMC Mortgage Investors in the amount of $8,757.70.

5. That both of the above checks were dishonored by the bank on which they were drawn because there were insufficient funds to cover them; they were redeposited twice and dishonored on both occasions.

6. That by reason of advancements from Pioneer National Title Insurance Company, the insuror of title on the project, the two checks were validated approximately two weeks after their issuance.

7. That no direct financial loss to the payees of the checks can be attributed to the dishonor of the checks although there was considerable inconvenience and concern caused by the dishonor which was well publicized among those directly involved in the project.

8. That the principal reasons for the dishonor of the two invalid checks were: the death of one of Respondent's law partners, James Webb, in June, 1973, and who was, at least, one of the principals in handling KTIC's books and records; a general ineptness in handling the cash flow of

KTIC; investment by KTIC in another business from the escrow account; a commingling of other company funds with the escrow account; adherence to the practice of "playing the float" in the escrow account and a previous title loss of approximately $75,000.00, paid by KTIC.

9. That due to the confusion and state of the records of the escrow account, Respondent was unaware that the two checks when issued were not valid.

10. That the losses occasioned Pioneer National Title Insurance Corporation have been satisfied by KTIC by issuance of a new obligation in the form of a promissory note from Jonathan Belknap, the widow of James Webb, and William Friedlander and his wife.

11. That although Respondent was acting in his capacity as president of KTIC and not as an attorney in issuing the checks, the fact that Respondent was an attorney and the ownership of KTIC was vested in the law firm, it is concluded that Respondent's legal expertise and professional standing were relied upon by those dealing with Respondent in the transaction.

CONCLUSIONS

12. That although the evidence disclosed instances of conduct on the part of Respondent that may have formed the basis of other charges against Respondent, the Committee concluded that such evidence was not relevant except to the extent that it related to the circumstances under which the invalid checks were issued, inasmuch as the only charge against Respondent was the issuance of the two invalid checks.

13. That the checks in questiton were satisfied by the issuance and acceptance of a new obligation and evidence as to the payment or non-payment of the new obligation was not competent.

14. That the mere issuance of the invalid checks by Respondent did not in itself constitute grounds for disciplinary action but the circumstances under which the checks were issued along with the consequences and disposition of the matter were proper factors which were considered by the Committee.

15. That the Committee concludes that a preponderance of the evidence discloses that Respondent is guilty of the misconduct as charged in both counts and that same constitutes unethical and unprofessional conduct on the part of Respondent and is calculated to bring the bench and bar of Kentucky into disrepute.

RECOMMENDATION

16. The majority of the Trial Committee recommends that Respondent be suspended from the practice of law for one year.[1]

Dated: April 16, 1975

(s) Gardner L. Turner
Chairman

---

[1]One member of the Committee dissented for the following reasons: "I have little trouble in concluding that the conduct of Respondent falls short of that standard ordinarily displayed by Kentucky lawyers in general. However, I dissent from so much of the Trial Committee's recommendation that provides for a one year suspension. Until such time that the self-disciplinary standards of the legal profession, as they relate to its tangential field of law practice, are more adequately defined. Cases of this nature should more appropriately be handled by private or public reprimand. Suspension or disbarment should be imposed only where recourse to less stringent measures would not fully and adequately protect the public. In any profession suffering the restraints of self-imposed regulation, there exists, always, the hazard of losing sight of the real and genuine purpose of such regulations. Often the decision turns upon punishing the respondent as a criminal wrongdoer rather than taking such remedial steps as may be necessary to maintain the legal profession in high esteem."

MEETING OF BOARD OF GOVERNORS, BARREN RIVER STATE PARK, GLASGOW, KENTUCKY JULY 19, 1975—Filed July 31, 1975.

The President excused from the room all persons whose presence was not authorized pursuant to the Rules as they relate to the consideration of disciplinary cases. In Executive Session, the Board considered the charge against William Friedlander.

The Trial Committee composed of Gardner L. Turner, Chairman, John D. Miller and Lawrence I. Messmer having tendered a written report recommending that the Respondent be adjudged guilty of unprofessional conduct and be suspended from the practice of law by the Court of Appeals of Kentucky for a period of one year. On motion duly made and seconded, the report was ordered filed.

On call of the roll, the Respondent was adjudged guilty as charged by a vote of 12-2. Upon a second roll call, by a vote of 11-3, it was recommended that the Respondent be permanently disbarred from the practice of law in Kentucky.

IN RE: WILLIAM FRIEDLANDER
FINDINGS AND RECOMMENDATIONS OF THE BOARD OF GOVERNORS

The above case having been called and a report having been submitted and approved and the matter having been fully considered, the following finding and recommendation is made:

FINDING

That the Respondent, William Friedlander, be adjudged guilty.

RECOMMENDATION

It is respectfully recommended to the Kentucky Court of Appeals that William Friedlander be permanently dis-

barred from the practice of law in Kentucky and required to pay the costs in this action.

This July 19, 1975.

(s) Ben L. Kessinger, Jr., President

Attest:
(s) Leslie G. Whitmer, Director

COURT OF APPEALS OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

WILLIAM FRIEDLANDER - - - - *Respondent*

CHARGE—Filed February 4, 1974.

Comes now the Kentucky Bar Association, by and through its Inquiry Tribunal, and states that the respondent, William Friedlander, whose last known address is 701 Republic Building, Louisville, Kentucky 40202, a member of said association, did engage in the following conduct:

I

In connection with the construction of Jackson House, Paducah, Kentucky, a high-rise apartment building sponsored by Kentucky Senior Citizens Union Labor Housing, Inc., respondent, William Friedlander, represented the sponsor; Kentucky Mortgage Company, Inc., the mortgagee; the title insurance company, Kentucky Insured Title Corporation, Kentucky agent for Pioneer National Title Insurance Company; and J. T. Duffy and Associates, the housing consultant. Kentucky Insured Title Corporation is owned by respondent's law partnership of Friedlander, Webb and Belknap. Kentucky Mortgage Company had provided respondent with funds to cover certain disbursements in the amount of $185,076.49 requested by the mortgage company to be made by respondent on or about July 25, 1973.

Respondent on or about July 27, 1973, notified Kentucky Mortgage Company that he had disbursed $109,851.69 to the

contractor Seth E. Giem and Associates and General Insurance Company of America said check in payment drawn on the account of Kentucky Insured Title Corporation which was returned twice unpaid because of insufficient funds. Respondent on or about July 27, 1973, notified Kentucky Mortgage Company that he had disbursed $8,757.70 to Kentucky Mortgage Company Mortgage Investors said check in payment drawn on the account of Kentucky Insured Title Corporation was returned twice unpaid because of insufficient funds.

WHEREFORE, complainant charges that such facts and actions on the part of Respondent constitutes unethical and unprofessional conduct; that the same are calculated to bring the bench and bar of Kentucky into disrepute; and that discipline of an appropriate degree should be administered to the Respondent in accordance with RCA 3.380.

Kentucky Bar Association
By: (s) William P. Donan, Chairman
Inquiry Tribunal

Attest:
(s) Leslie G. Whitmer, Director

Supreme Court, U. S.
FILED
SEP 27 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-360

WILLIAM FRIEDLANDER - - - Petitioner

Versus

KENTUCKY BAR ASSOCIATION - - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

LESLIE G. WHITMER
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Frankfort, Kentucky 40601
Counsel for Respondent

September 23, 1976.

ROBERTS PRINTING CO., FRANKFORT, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-360

WILLIAM FRIEDLANDER - - - - - Petitioner

Versus

KENTUCKY BAR ASSOCIATION - - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Kentucky (Petition, Appendix, pp. 1a-5a) is reported in 536 S.W. 2d 454 (Ky. 1976).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the disciplinary proceedings of the Kentucky Bar Association and the Supreme Court of Kentucky were conducted in such a way as to deny the petitioner procedural due process of law under the

Fourteenth Amendment of the Constitution of the United States.

2. Whether the evidence supports the findings and judgment of the Supreme Court of Kentucky.

RULES INVOLVED

Rules of Supreme Court of Kentucky (RAP) Concerning Procedures in Disciplinary Cases

1.280 *When granted.* Oral arguments will be heard on motion of either party or on the Court's own motion in such cases as the Court may believe an oral argument will materially contribute to a proper decision.

3.300 ***Rights of Respondent Against Whom A Charge has been Filed.*** The respondent against whom a charge has been filed shall have the right to be represented by counsel and entitled to a hearing before a Trial Committee. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in the investigative file of the association. He shall have the right to an oral argument or to file a brief before the Trial Committee. He shall be afforded a full opportunity to remain silent, to defend himself by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the Chairman, upon written request in affidavit form, made within twenty days after service of the charges, shall appoint counsel for the respondent.

3.330 *Order of Proceedings and Burden of Proof.* The Trial Committee shall determine and

regulate the order of proceedings at the hearing. Upon the application of a party or upon direction of the Trial Committee, the Director shall issue subpoenas for the attendance of witnesses or the production of evidence. The burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must be proven by a preponderance of the evidence. In reinstatement hearings, the burden shall rest upon the applicant. Before submission the Trial Committee may direct such oral argument as it deems appropriate and receive briefs from all parties on such terms as it may impose. After submission of the case to the Trial Committee, there shall be no further oral argument or briefing either before the Trial Committee or before the Board.

3.380 *Degrees of Discipline.* Upon finding by the Board of guilt or unprofessional conduct, discipline may be administered by way of private reprimand issued by the Board without further proceedings or right of appeal to the Court; or by the Court, under RAP 3.320, or upon recommendation by the Board, by way of public reprimand, censure, suspension from practice or disbarment. If a private reprimand is issued, it shall not be made public and shall be transmitted only to the respondent, or to his attorney, and to the attorney for the complainant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

. . . . nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Revised Statutes

30.170 *Court rules governing practice of law and state Bar*

(1) The Court of Appeals [now called Supreme Court of Kentucky] shall adopt and promulgate rules:

(a) Defining the practice of law;

(b) Prescribing a code of ethics governing the professional conduct of attorneys and the practice of law;

(c) Establishing practice and procedure for disciplining, suspending and disbarring attorneys;

(d) Organizing and governing a bar association of the attorneys of the state to act as an administrative agency of the Court of Appeals for the purpose of enforcing such rules as are adopted and promulgated by the court under this section; providing for the government of the state bar as a part of the judicial department of state government, and for such divisions thereof as the Court of Appeals determines; requiring all persons practicing law in this state to be members in good standing of the state bar; and fixing the form or its organization and operation;

(e) Fixing fees upon recommendation of the board of bar commissioners to be paid for the purpose of administering this section and the rules adopted and promulgated under it, and for the collection and disbursement of such fees.

(2) The rules of court adopted and promulgated under this section shall supersede all laws or parts of law in conflict therewith, to the extent of the conflict.

(3) No rule adopted and promulgated under this section shall prevent a person not holding himself out as a practicing attorney from writing a

deed, mortgage or will, or prevent a person from drawing any instrument to which he is a party.

STATEMENT OF THE CASE

On February 4, 1974, a charge alleging unprofessional and unethical conduct was filed against William Friedlander by the Kentucky Bar Association. The charge stated that during 1973, the law firm of Friedlander, Webb and Belknap was the sole owner and operator of Kentucky Insured Title Company (hereinafter referred to as KITC). William Friedlander's firm's practice was limited almost solely to real estate law. KITC received and placed in its escrow account some $135,076.49 from Kentucky Mortgage Company (hereinafter referred to as KMC) on or about July 25, 1973. The funds were received during the course of William Friedlander's representation of the sponsor of an apartment structure in Paducah, Kentucky. KMC gave directions for the distribution of these funds to Seth E. Giem (the contractor) and General Insurance Company of America in the amount of $109,851.69 and to Kentucky Mortgage Investors in the amount of $8,757.70. William Friedlander issued or caused to be issued checks in the stated amounts to said payees on the escrow account of KITC. Both checks were twice returned unpaid on the escrow account because of insufficient funds.

After petitioner filed a timely answer to the charge, trial hearings were held on June 18, 1974, and June 27, 1974. During these due process hearings a transcript of evidence was developed. (RAP 3.300). Briefs were filed before the trial committee and became a part of the record.

On April 18, 1975, the trial committee filed its

report making advisory findings of fact, conclusions and recommendations. Three members of the committee recommended a finding of guilty as charged; two members recommended a period of suspension from practice of one year, and one member recommended a private or public reprimand. On July 19, 1975, the Board of Governors of the Kentucky Bar Association made an advisory finding on the entire record that petitioner was guilty as charged by a vote of 12-2; and by a vote of 11-3, recommended disbarment from practice in the Commonwealth to the Supreme Court of Kentucky. On August 14, 1975, petitioner was served with a rule to show cause why he should not be disciplined for unprofessional conduct and was furnished a copy of the report of the trial committee and the order of the Board of Governors. A timely response to the rule and a supporting brief were filed by petitioner. Respondent filed its brief and the Supreme Court of Kentucky took the case under submission. Petitioner filed no motion for an oral argument although RAP 1.280 provides for oral arguments.

On January 23, 1976, the Supreme Court of Kentucky rendered a per curiam opinion citing the fact petitioner admitted that he participated in the use of trust funds from the escrow account of KITC for the benefit of his law firm and ordered him permanently disbarred from the practice of law. On February 19, 1976, petitioner filed in the Supreme Court of Kentucky a petition for rehearing which was subsequently denied on June 11, 1976.

ARGUMENT

The issues raised by the petitioner in his Petition

for Writ of Certiorari concern the constitutionality of the procedures utilized by the Supreme Court of Kentucky in disciplining its officers.

Each issue raised by petitioner will be answered briefly after a short consideration of the general issues in the case.

I.

THE DECISION BELOW WAS BASED ON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND

The constitutional issues raised by petitioner in his petition for rehearing before the Supreme Court of Kentucky were whether or not the disciplinary proceedings by the Kentucky Bar Association and Supreme Court were conducted in such a way as to deny him rights of procedural due process under the Fourteenth Amendment of the United States Constitution. The court in its per curiam opinion clearly based its decision on independent and substantial non-federal grounds.

Under the Rules of the Supreme Court of Kentucky and Kentucky case law, the findings of the trial committee and the Board of Governors were only advisory; and the court itself made an independent examination of the factual and legal issues involved and confirmed their advisory findings. (Petition, Appendix, p. 5a). The court itself was the only body which could impose any disciplinary action and there was no denial of procedural due process. All rules of the court were strictly followed at all stages of the proceeding.

The state court has clearly stated this position in *Kentucky Bar Association v. Stivers,* Ky., 475 S.W.

2d 900, cert. denied, 406 U.S. 968 (1972), stating, in part:

> "The report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. RCA 3.400, 3.420 (now RCA 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual issues and of the final action to be taken; The role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding." (p. 904)
>
> * * *
>
> "But it must be recognized that its action is nothing more than advisory to this Court. So far as we are concerned, the Board proceeding is mainly a screening device by which the respondent may be finally acquitted but cannot be convicted." (p. 904)
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> "In a matter as serious as this, the advisory weight of the Board's action can be little more than hortatory, which means in simple English, that the members of this Court are going to exercise their own judgment anyway." (p. 904)

It is equally clear that the court did exercise its own judgment by the fact that it refused to follow the recommendations of the trial committee concerning recommended discipline. Its judgment concerning factual issues agreed with the recommendations of the trial committee and the Board.

The constitutional issues raised by petitioner were answered by the court through the interpretation of Kentucky law and the Rules of the Supreme Court of Kentucky. There were no federal issues to be decided

since the sole basis on which to determine the validity of the petitioner's constitutional arguments rested on the proper interpretation of Kentucky law and standards of conduct set by the Kentucky court.

After firmly placing its opinion on uncontroverted facts found in the record formed by the trial committee at a due process hearing and so admitted by petitioner, the court then found from a record devoid of factual defenses that petitioner had misappropriated trust monies citing the court's recent opinion in the analogous cases of *Kentucky Bar Association v. Tucker,* 535 S.W. 2d 97, cert. denied, 46 L. Ed. 644 (1975) and *Kentucky Bar Association v. Collis,* 535 S.W. 2d 95, cert. denied, 46 L. Ed. 637 (1975).

The facts in this case clearly show petitioner to be dishonest and unfit to practice law. The public must be protected from such a practitioner.

The petitioner has requested this court to grant a Petition for Writ of Certiorari, and yet a close examination of the issues involved and a careful reading of the opinion rendered by the Supreme Court of Kentucky clearly reveals that the results reached in this case by the Supreme Court of Kentucky were based upon a clear and careful analysis of Kentucky substantive law, the Rules of the Supreme Court of Kentucky and the record in the case as a whole. Certiorari certainly should not be granted merely to review the findings of fact made independently by the Supreme Court of Kentucky and the sound standards of conduct applied to those facts by the court.

II.

THE DISCIPLINARY PROCEEDINGS OF THE KENTUCKY

BAR ASSOCIATION AND THE SUPREME COURT OF KENTUCKY DID NOT DENY PETITIONER PROCEDURAL DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner states on page 12 of his petition that *In re Ruffalo,* 390 U.S. 544, 551 (1968), holds that state disciplinary proceedings are "of a quasi-criminal nature." The *Ruffalo* case dealt with a federal disbarment proceeding. This court had before it the state proceeding but denied the Petition for Writ of Certiorari. *Ruffalo v. Mahoning County Bar Association,* Ohio, 199 N.E. 2d 396, cert. denied, 379 U.S. 931 (1964). While this Court has never, to respondent's knowledge, held that a state disciplinary proceeding lacks due process protections or even granted a Petition for Writ of Certiorari based on a state disciplinary proceeding, it is certainly clear this case raises no important constitutional issue warranting review by this Court in setting a precedent to grant review of unified state bar disciplinary procedures.

It is significant to note Chief Justice Warren E. Burger's comments on nationwide disciplinary efforts:

> "It is now five years since a committee of the American Bar Association, chaired by my distinguished colleague, Mr. Justice Clark, reported in essence that although we lawyers profess to regulate and discipline ourselves, by and large discipline of professional misconduct of lawyers is virtually non-existent in most of the fifty States. The American Bar Association is undertaking some steps to implement the Clark report, and in the past year or more there are encouraging signs of more progress than in the previous 25 years. That program demands more impetus and the moral support of the law school community, and of course the support of judges." Remarks of Chief Justice Warren E. Burger, Convocation for the Dedication, J. Reuben Clark, III Law School, Brigham Young University, Provo, Utah, September 5, 1975.

A. **There is no Denial of Due Process Where a Lawyer is Not Given Any Opportunity for a Hearing and Oral Arguments Before the Board of Governors.**

Petitioner readily admits he had a full due process hearing before a three-man trial committee, the chairman of which was designated and commissioned by the Chief Justice of the Supreme Court of Kentucky to try the issues in the proceeding although he disagrees with the introduction of two items of evidence. (Petition, page 9). As noted before, the Supreme Court of Kentucky found petitioner guilty from his own testimony and ignoring all other evidence present in the record. (Petition, Appendix, pp. 2a-3a).

In order for the Court to review the excellent due process procedures incorporated into Rule 3 of the Supreme Court of Kentucky, it is necessary to start at the beginning of the disciplinary process. In petitioner's case, a complaint was filed and investigated. Matters of severe unprofessional conduct were disclosed. Notice was given of the complaint and a timely response was filed. The Inquiry Tribunal, appointed by the Chief Justice of the Supreme Court of Kentucky, reviewed the complaint and response and determined that probable cause existed to conclude that petitioner had been engaged in unprofessional conduct; therefore, a charge was filed. Petitioner received notice of the charge and filed a timely answer thereto. A full due process hearing was held in a "de novo" climate. The

advisory trial committee report, the charge, the answer, and transcript of proceedings before the trial committee with briefs were reviewed by the Board of Governors without the presence of counsel on either side. The following order apears in the Board's minutes of July 19, 1975:

> "The President excused from the room all persons whose presence was not authorized pursuant to the Rules as they relate to the consideration of disciplinary cases. In Executive Session, the Board considered the charge against William Friedlander." (Petition, Appendix, p. 13a).

The Board of Governors had three alternatives: dismiss the charge, issue a private reprimand, or recommend public discipline to the Supreme Court of Kentucky. If the first two alternatives had been exercised, the case would have terminated without any detriment to the petitioner and the Board's sole function as a "screening device" would have been utilized. The vital elements of the due process hearing were fresh before the Board of Governors. The Board proceeded to *recommend* to the Supreme Court of Kentucky discipline in the form of disbarment. At that point, a possible point of detriment to petitioner, the court issued a rule to show cause submitting to petitioner the advisory trial committee report and order of the Board. Petitioner at that point, again, had an opportunity to file a response to the rule and brief in support thereof. Petitioner exercised that right. After the adverse opinion of the Supreme Court of Kentucky was rendered, petitioner exercised his rights to file a petition for rehearing wherein new issues were presented to the court. In short, Kentucky's disciplinary proceedings are carefully drafted to assure all possible

due process to an attorney under charge. At all crucial points in the proceeding notice and an opportunity to be heard are provided on numerous occasions.

It is respectfully submitted that case law involving administrative proceedings in the executive branch of government with the right of review by the judicial branch are not applicable to original actions in the judicial branch by the court of highest jurisdiction in a state seeking to discipline officers of the court through proceedings instituted by the court through an administrative arm of the court: its unified bar association. Due process of law must be accorded to an attorney. This had been done without any doubt by Rule 3 of the Supreme Court of Kentucky.

The disciplinary proceedings of the Supreme Court of Kentucky are not unlike disciplinary proceedings before the United States Supreme Court as provided in Rule 8. It appears that where factual issues are raised, the Court may appoint a committee to make an inquiry into the matter and submit a report and recommendation to the Court. Stern and Gressman, *Supreme Court Practice*, 3rd Edition (1962).

Respondent will answer specific matters raised by petitioner regarding proceedings before the Board of Governors. The Board of Governors serves as a "screening device." A charge can be dismissed by the Board, however, *no* public discipline can be ordered so there is *no final* action taken by the Board in that respect. It would serve no useful purpose to permit either respondent or petitioner or both to appear before the Board in any manner other than by the record produced at the due process hearing. The use of this "screening device" is based on state law and raises no

federal due process issue. There is no "hearing" before the Board. The proceedings before the Board are a valid exercise of the statutory (KRS 30.170) and inherent power of the Supreme Court of Kentucky (Rule 3).

When the Board recommends public discipline, a lawyer is given access and notice of the entire disciplinary file and has the opportunity to respond to a rule to show cause and file a brief in support thereof before the court decides his case. There is no disparity between the factual findings of the trial committee and the Board or the court in this case. Two members of the trial committee recommend a one-year suspension period by the state court. Had the "Board" step of the proceeding been eliminated, the case would have gone to the Supreme Court of Kentucky for determination of factual matters and the degree of discipline to be ordered. There is only an issue raised by the Board's order as to the degree of discipline to be ordered. The Board recommended disbarment. The Board's recommendation is supported by the cases of *Kentucky Bar Association v. Collis* and *Kentucky Bar Association v. Tucker*, cited above. Had the trial committee known what the state court was to hold in these cases it is submitted that all three members of the trial committee would have recommended disbarment. Certainly this Court will not entertain the issue of whether or not the case should have been dismissed or the degree of public discipline to be given by the state court. The tests of *Willner v. Committee on Character*, 373 U.S. 96, 105 (1963) and *Morgan v. United States*, 298 U.S. 468 (1936), are sustained by Kentucky disciplinary rules. The factual situation in *Southern Railway*

Company v. Virginia, 290 U.S. 190 (1933) cited by petitioner at page 14 of the petition has no application to this case. Petitioner had notice, in fact, answered as fully as he could before the Inquiry Tribunal, the trial committee and the court before final discipline was ordered. He was also heard before the court on a petition for rehearing. There was no rule that prohibited petitioner from requesting an oral argument before the court. Petitioner never moved the court for an oral argument.

B. **The Absence of a Full Factual Inquiry Before the Justices of the Supreme Court of Kentucky in Person Where the Court Judges all Factual Issues Does Not Deny Due Process.**

The aforesaid issue was not raised before the Supreme Court of Kentucky and is, therefore, not properly before this Court; however, the issue will be discussed.

The Supreme Court of Kentucky did give weight to the findings of the trial committee and the Board of Governors. The court made the same finding as the two lower bodies in relation to the checks given on behalf of a client and returned because of "insufficient funds." The court stated it drew no inference in stating the funds had been converted to petitioner's own use. The record is void of any evidence whatsoever showing this was not the case. The clients' funds were not intact. Disbarment results under that fact situation. This case is not unlike the case of *Kentucky Bar Association v. Judy Ward Smith*, Ky., 492 S.W. 2d 880, cert. denied, 414 U.S. 859 (1973), where the state court, exercising its fact finding authority, found from the record that Ms. Smith was guilty of various crimes and perjury at the trial hearing from the tran-

script formed before the trial committee and disbarred her even though she was given no hearing in these "new findings" before the court. This Court denied her Petition for Writ of Certiorari when the Kentucky court's action was challenged.

Petitioner argues that there is a de novo proceeding before the Supreme Court of Kentucky. This is not an accurate statement. The court must and in this case did make its findings from petitioner's own testimony in the record produced at a full due process hearing. In no way was this hearing's product reduced to insignificance before the Supreme Court of Kentucky. Only the degree of discipline imposed was increased from the recommendation of the trial committee. This due process hearing was further reinforced by a rule to show cause before the state court together with a petition for rehearing. The *Willner* case is certainly not the key to this case. (Petition, p. 16). As stated by petitioner, the New York Appellate Division relied on an *inadequate* report of a committee on character and fitness in a bar admissions case where the committee held no due process hearing. Petitioner admits a full due process hearing before the trial committee. The product of this hearing formed the record before the Supreme Court of Kentucky: a complete, accurate and fair record. Petitioner at all stages of response answered as fully as he could to all allegations of the charge. The petition for reheaing permitted the state court to correct any error it may have made in its opinion. There were no errors. No corrections needed to be made.

No Kentucky lawyer is disbarred before the Supreme Court of Kentucky without first having his due process rights fully protected by the rules of that

court. Full constitutional safeguards are given a lawyer.

Before this Court petitioner, for the first time, poses the argument that where the Supreme Court of Kentucky is the court of original jurisdiction it is a denial of equal protection and due process to deny the right of appeal to attorneys although every other litigant in Kentucky is permitted an appeal as a matter of right. This novel argument was not made before the state court; therfore, it is not properly before this Court and cannot be considered. The obvious answer to this issue is that equal protection is in fact given to every attorney under Rule 3 of the Supreme Court of Kentucky. All are treated the same. Needless to say, there can be no appeal from the highest court in the state of Kentucky when the original action is in that court. The only reason for an appeal in the state court system is to permit a review by a higher state court. Petitioner's argument has no merit whatsoever.

III.

THE DECISION BELOW IS CORRECT AND THERE ARE NO JUSTICIABLE REASONS FOR GRANTING THE WRIT.

The Per Curiam Opinion of the Supreme Court of Kentucky is based soundly on facts in the record before it. The court considered all defenses offered by petitioner and clearly stated so. The court found no mitigating circumstances in the record in its sound discretion. A fair reading of the record supports the entire opinion of the court. The opinion clearly cites the evidence it found in the record to support its findings. The court applied a clear standard to the facts citing the public peril resulting from petitioner's actions and its grave effect on the image of the bench and

bar. Disbarment is the only responsible action the Supreme Court of Kentucky could take to protect the public from the gross, dishonest conduct of petitioner.

On November 11, 1969, by RAP 3.130, the Kentucky Court of Appeals (now the Supreme Court of Kentucky) adopted the American Bar Association Code of Professional Responsibility as a sound standard of conduct required of lawyers and that charges can be preferred where those standards are not met. The following provisions of the Code have obviously been breached by petitioner:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty . . .

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 9-102 Preserving Identity of Funds and Property of Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

EC 9-5 of the Code states:

> Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

This Court has made clear the strong state interest of state courts in setting standards of conduct for and disciplining its members in the recent case of *Goldfarb v. Virginia State Bar, et al.*, 95 S. Ct. 2004 (1975) at p. 2016, when it stated:

> "'We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that

in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' *United States v. Oregon State Medical Society*, 343 U.S. 326, 336, 72 S. Ct. 690, 697, 96 L. Ed. 978 (1952), see also *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 611-613, 55 S. Ct. 570, 571-572, 79 L. Ed. 1086 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'. See *Sperry v. Florida*, 373 U.S. 379, 383, 83 S. Ct. 1322, 1325, 10 L. Ed. 2d 428 (1963); *Cohen v. Hurley*, 366 U.S. 117, 123-124, 81 S. Ct. 954, 958, 6 L. Ed. 2d 156 (1962); *Law Students Research Council v. Wadmand*, 401 U.S. 154, 157, 91 S. Ct. 720, 723, 27 L. Ed. 2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act, we intend no diminution of the authority of the State to regulate its professions."

If the Supreme Court of Kentucky gave little significance to the petitioner's evidence, it was due to the lack of credibility of the evidence and not due to an oversight on the part of the court. The factual determination by the lower court and the weight and credibility accorded to the evidence are not properly reviewable especially where the court, directly in its opinion, reviewed the evidence.

Petitioner states that although RAP 3.330 states that "the burden of proof shall rest on the association in disciplinary proceedings and the facts must be proven by a preponderance of evidence," the test should be "beyond a reasonable doubt" because Kentucky disciplinary proceedings are "quasi-criminal." This issue

was not raised before the state court and cannot be considered, however, the issue will be discussed. Kentucky disciplinary proceedings are civil by nature as a matter of sound state law. *Commonwealth ex rel. Buckingham v. Ward*, Ky., 267 Ky. 677 (1937). This Court has never reversed a state court disciplinary action because it was a civil proceeding. The issue is really moot in Kentucky since the Supreme Court of Kentucky has held that it is probable each justice applies the "beyond reasonable doubt test" anyway. *Kentucky Bar Association v. Franklin*, 534 S.W. 2d 459 at 463 (1976). In the case at bar, petitioner was found guilty beyond any doubt on his own testimony stating guilt as charged. The trial committee, the Board of Governors and the state court all made the same findings of fact.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Leslie G. Whitmer, Counsel for Kentucky Bar Association, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of September, 1976, I served on Thomas L. Hogan and Robert E. Delehanty, Suite 401, 701 West Walnut Street, Louisville, Kentucky 40203, Attorneys for Petitioner, a copy of this brief by mailing same, postage prepaid.

Leslie G. Whitmer

LESLIE G. WHITMER